88-661

No. 88-_____

Supreme Court, U.S.
FILED
SEP 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1988

JOHN H. SPENCER,

Petitioner,

vs.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY,

Respondent.

Petition for a Writ of Certiorari
to The Court of Special Appeals
of Maryland

John H. Spencer,
Petitioner Pro Se
Route 5, Box 150
Oakland, MD 21550

QUESTIONS PRESENTED

I. WHETHER PETITIONER'S RIGHTS WERE VIOLATED UNDER ARTICLE 19, OF THE DECLARATION OF RIGHTS OF THE CONSTITUTION OF MARYLAND?

II. WHETHER THE COURT OF SPECIAL APPEALS OF MARYLAND ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF A CLAIM FOR RECOVERY OF DAMAGES THAT EXISTED UNDER A CORPORATE BOND TO THE STATE OF MARYLAND THAT FIRMLY BOUND THE SURETY THAT NO INJURY OR DAMAGES WOULD OCCUR?

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QUESTIONS PRESENTED

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REASON FOR GRANTING THE WRIT

It is respectfully submitted the Writ of Certiorari sought should be granted for the reason the Court of Special Appeals of Maryland in affirming a dismissal of a case by a lower court to enforce the liability of a surety for its principal's default and wrongful act, ignores existing case law thereby placing itself in conflict with federal Circuit Courts of Appeals and other state courts of last resort.

To the Honorable Chief Justice of the United States and, The Associate Justices of the United States Supreme Court.

Petitioner, John H. Spencer, prays that a Writ of Certiorari be issued to review a judgment of the Court of Special Appeals of Maryland that affirmed a dismissal of a case against a surety in the Circuit Court of Garrett County, Maryland holding the surety did no wrong, but if the surety's principals did, a separate malpractice action should be brought against the principals.

Copies of the order of the Court of Special Appeals of Maryland affirming the dismissal of the Circuit Court for Garrett County, Maryland rendered on March 24, 1988 and the denial of the Writ of Certiorari by the Court of Appeals of Maryland are annexed hereto as Appendix "A" and "B".

Motion for Reconsideration was filed on April 12, 1988 in the Court of Special Appeals of Maryland. This motion was denied.

A Petition for Writ of Certiorari was filed in the Court of Appeals of Maryland on May 12, 1988 which was denied on June 27, 1988.

DISCUSSION

Petitioner submits he was a party in a closed unreported divorce case that began October 5, 1983 in the Circuit Court for Garrett County Maryland, Civil No. 8477, which did not come to an end until a Writ of Certiorari was denied by the Court of Appeals

of Maryland on May 7, 1987. This old case took nearly four (4) years that was anticipated to be completed within one (1) year. It is opined the case represents an opprobrium to the phrase "Justice under the Law." This case was appealed twice. Decisions were made in the trial court the chancellor was unaware of the changes in the law by the General Assembly of Maryland in 1978. Chancellor determined a mandate from appellate court was moot, and when the case was appealed again the appellate court affirmed.

It was during this case the undisputed default and wrongful act occurred by the principals of the surety. At the time, the principals were wearing three hats, one as the principals of the surety, one as trustees for the Circuit Court, and one as the attorneys for the parties. The principals were acting under a bond to the State of Maryland, prepared by the surety and filed in the trial court, stating they would

faithfully perform their duties without injury to the State or any party of interest.

The Petitioner was a party of interest and was seriously injured by the principal's default and wrongful act in an undisputed claim, and the Court of Special Appeals of Maryland erred by affirming a decision by the trial court that dismissed a Motion to Proceed Against Surety to enforce the liability under the contract of the bond suggesting the Petitioner should bring separate and new litigation against the attorneys for malpractice.

This case is one of first impression in the State of Maryland.

JURISDICTION

This Court's jurisdiction is invoked pursuant to Title 28, United States Code, Section 1257 (1).

No application has been filed for an extension of time to file this petition.

STATEMENT OF THE CASE

The Petitioner on August 6, 1987 filed a Motion to Proceed Against Surety to enforce the liability of the surety for the default and wrongful act of the surety's principals in the Circuit Court for Garrett County, Maryland. The case came up for hearing on September 16, 1987 before the Hon. Frederick A. Thayer, III, Chief Judge of the Fourth Judicial Circuit of Maryland. The arguments and evidence submitted to verify the truth of the allegations in the original complaint, and in opposition to the defenses were not disputed.

Judge Thayer stated on page five (5) of the transcript: "If you (The Petitioner) have a grievance, you have a cause of action against your attorney for malpractice or whatever, perhaps against the other trustee, if there's a conspiracy, or whatever structure you may determine to be appropriate, but it occurs to me that this is

a false start." The Respondent on page eight (8) stated: "We submit that he (Petitioner) is going against the wrong party at this time, and St. Paul would ask that his motion be dismissed."

On September 24, 1987 the trial court ruled the Motion to Proceed Against Surety was denied, and the action it represents is dismissed. The authority given was: "John has simply put his horse in the wrong stable." On September 30, 1987 Petitioner filed a Motion to Alter or Amend Judgment. On October 20, 1987 the trial court denied the motion.

On October 23, 1987, Petitioner filed an order for appeal to the Court of Special Appeals for Maryland which affirmed the trial court's dismissal on March 24, 1988 a Motion for Reconsideration was filed April 12, 1988 and was denied. (Appendix "A")

A Petition for Writ of Certiorari was filed in the Court of Appeals of Maryland on May 12, 1988 and was denied June 27, 1988. (Appendix "B")

ARGUMENT

I. WHETHER PETITIONER'S RIGHTS WERE VIOLATED UNDER ARTICLE 19, DECLARATION OF RIGHTS OF THE CONSTITUTION OF MARYLAND?

Petitioner submits Article 19 provides every citizen with the right to justice by law if he or she is injured or wronged.

At the September 16, 1987 summary procedure hearing the eight exhibits submitted to verify the surety's principals default and wrongful act were not disputed by the Respondent. The argument in opposition to the defenses were not disputed by the Respondent. The amount of the claim presented was not disputed by the Respondent. The weight of the evidence in this cause does not support a dismissal because the surety did no wrong, when in fact, its principals did.

All sureties become bound with their principals by the same instrument. Sureties are the original promisor and debtor from the

beginning and are held answerable for every debt, every default and miscarriage of their principals.

II. WHETHER THE COURT OF SPECIAL APPEALS OF MARYLAND ERRED IN AFFIRMING THE TRIAL COURT'S DISMISSAL OF A CLAIM FOR RECOVERY OF DAMAGES THAT EXISTED UNDER A CORPORATE BOND TO THE STATE OF MARYLAND THAT FIRMLY BOUND THE SURETY THAT NO INJURY OR DAMAGES WOULD OCCUR?

Petitioner submits there are numerous differences between the Maryland Rule 1-404 and the Federal Rule of Civil Procedure 65.1. The Federal Rule limits this summary procedure to certain bonds, and the Maryland Rule includes all bonds. The accepted and usual course of judicial proceedings in Federal Courts should be followed in Maryland courts since this case against a surety is one of first impression in Maryland.

The general provisions of Chapter 400, of Maryland Rule 1-401 states this chapter applies to any bond filed in a civil action.

Rule 1-404 grants the right to any injured party to enforce the liability of the surety on motion without necessity of an independent action. (Source: This Rule is derived from FRCP 65.1) For comparison of these rules see (Appendix "C")

The Petitioner submits the Court of special Appeals erred in affirming the trial court's dismissal since it in conflict with three (3) federal Courts of Appeals, the Second Circuit, in Aerotrade v. Republic of Haiti v. Hartford Accident & Indemnity Company, 552 F.2d 60., Buddy Systems Inc. v. Exer-Genie, Inc., 545 F.2d 1164. In this case the United States Court of Appeals, Ninth Circuit at (FN7) stated whenever security is given in the form of a bond or stipulation or other undertaking with one or more sureties, each surety('s) liability on the bond or undertaking may be enforced on motion without the necessity of an independent action. See also, Dragor v. Union Tank Car, 371 F.2d 722.

For state courts of last resort there are ten (10), see Roberts v. Fuhr, 523 So.2d 20, Allegheny Mutual v. Franklin, 513 N.E. 2d 658, Ashland Oil, Inc. v. Arnett, 496 N. E. 2d 1313, Kegerris v. Auto-Owners Insurance Co., 484 N.E.2d 976, State v. Chandler, 460 So. 2d 1302, Alabama Cablevision Co. v. League, 416 So.2d 433, Wyoming Bancorporation v. Bohem, 563 P.2d 1382, L'Enfant Lange v. Fitness System, Inc., 354 A.2d 233, and Lange v. Valencia, 533 P.2d 304.

Note the Court of Special Appeals of Maryland decision misstates the questions presented and the entire voluminous record of the closed divorce case and this case against the surety was consolidated and forwarded to the appellate court from the trial court. The decision states: "We note that a careful review of the procedural history of this case reveals that only appellant's first contention is properly before us. Appellant's other arguments relate to certain orders of the circuit court, entered in

appellant's divorce action, which we have previously reviewed and affirmed." The Petitioner contends the divorce action, and the action against the surety are separate actions and should be treated as such, since the divorce case is closed. The questions presented in this case were not presented in the divorce case. This decision goes on to say the docket entries reflect that on March 17, 1985 the circuit court discharged the trustees and released the bond. This date should be May 17, 1985. In quoting the circuit court's ruling stating the exchange agreement between the parties in the divorce action was a voluntary exchange of the properties, when the wrongful act of the trustees forced the parties under duress to exchange the properties.

The appellant court relying on the trial courts determination that no damage or injury to the Petitioner, need further explanation, since the Petitioner lost his rights under a thirty year contract with the opposite party

in the amount of $84,000.00, and was left saddled with a $28,000.00 mortgage for which both parties obligated themselves. Each party in the divorce case was entitled to credits against the sale proceeds of the real properties for fifty percent (50%) of the mortgage payments made after April 30, 1981. Petitioner lost $10,000.00 on this point, when the trial court refused to act on a Motion for Judgment and Credits. Therefore, if this loss resulted in no injury or damage then what does the definition of the words injury and damage mean?

The decision goes on to say the Court of Appeals has held that an appeal from a decree of a court of equity directing the sale of realty does not stay the proceedings unless an appeal bond is filed or a stay is obtained from the lower court. Cook v. Boehl, 188 Md. 581, 592, 53 A.2d 555 (1947). See also Pulley v. State, 287 Md. 406, 412 A.2d 1244 (1980). In these cited cases the subject matter on appeal was not the real estate,

they were appealed on different issues. The appellate court refused to take notice of the fact the trial court would not stop the sales of real property pending appeal with the subject matter on appeal the real properties contained nonmarital property values and the trial court refused to accept payment of the judgment, since it was not in the business of collecting judgments. The Mandate states the stenographer's costs were $605.00. The Petitioner has a paid invoice from the court stenographer in the amount of $22.50. The conflicts between the federal courts and other state courts of last resort on enforcing the liability of a surety warrants review by this Honorable Court.

CONCLUSION

From the foregoing, Petitioner prays the Petition for a Writ of Certiorari will be granted.

Respectfully submitted,

September 26, 1988

John H. Spencer,
Petitioner, Pro Se,
Route 5, Box 150
Oakland, MD 21550

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on September 26, 1988 three copies of the foregoing Petition for Writ of Certiorari was mailed U. S. postage prepaid to Gary C. Duvall and Kenneth F. Spence, III, Miles & Stockbridge, Attorneys for the Respondent, St. Paul Fire and Marine Insurance Co., at 401 Washington Ave., Towson, Maryland 21204.

John H. Spencer

John H. Spencer

STATE OF MARYLAND: GARRETT COUNTY TO-WIT:

Subscribed and sworn to before me a Notary Public in and for the County and State aforesaid, personally appeared and sworn this to be his true signature.
Witnessed by my hand and seal.

Shawn A Stoner

Notary Public
My commission expires
07-01-90

APPENDIX "A"

UNREPORTED

IN THE COURT OF SPECIAL APPEALS

OF MARYLAND

NO. 1202

September Term, 1987

JOHN H. SPENCER

v.

ST. PAUL FIRE & MARINE
INSURANCE CO.

Gilbert, C.J.
Wenner
Menchine W. Albert, (retired
specially assigned)

JJ.

Per Curiam

Filed: March 24, 1988

Upon this appeal, John H. Spencer, appellant, asks us to reverse a judgment of the Circuit Court for Garrett County (Thayer, J.), which denied his Motion to Proceed Against Surety.[1] Specifically, appellant contends:

1. The trial court abused its discretion in dismissing the motion to proceed against surety;

2. The trial court made a mistake in jurisdiction by filing and releasing the bond, while the case was pending appeal;

3. The surety was negligent for issuing the bond while the case was on appeal; and

4. The trial court erred in decreeing a judicial sale because the jurisdictional requisites were not met.

We shall affirm.

Initially, we note that a careful review of the procedural history of this case reveals that only appellant's first contention is properly before us.[2] Appellant's other arguments relate to certain orders of the circuit court, entered in appellant's divorce action, which we have previously reviewed and affirmed.[3]

(Footnotes)

! St. Paul Fire and Marine Insurance Company was the surety on the bond filed by the trustees in appellant's divorce action.

2 We note, however, that appellant's third contention is essentially the same as his first. Thus we will address it in that context.

3 On July 10, 1984, in the case of Spencer v Spencer, the circuit court ordered that two properties, titled jointly to the parties, be sold and the proceeds distributed equally between them. The court also appointed trustees to sell the properties, and set a corporate bond at $100,000. An appeal of this order followed. On July 10, 1985, in No. 1433, Sept. Term, 1985, per curiam, we vacated the circuit court's July 10, 1984 order and remanded the case for a new trial. A new trial was held in the circuit court on December 9, 1985. The circuit court's judgment was appealed and we again affirmed in a per curiam opinion filed December 10, 1986.

The question we shall decide is: "Whether the trial court erred in dismissing the Motion to Proceed Against Surety."[4] We find no error.

The docket entries reflect that on March 17, 1985 the circuit court discharged the trustees and released the bond, because the parties in the underlying divorce action had entered into an "Agreement for Exchange of Real Properties" which settled the real property issues, thus making a judicial sale unnecessary.

It is a general principle of suretyship law that the release of a principal discharges the surety. Fidelity Deposit v. Olney Associates, 72 Md. App. 367, 371 n.2, 530 A.2d 1 (1987). As the circuit court noted in its order denying appellant's Motion to Proceed Against Surety:

> It becomes abundantly clear that the surety bond against which John is attempting to proceed was released by order of this Court because the trustees appointed to make judicial sale of the real

> estate were discharged as a result of the voluntary exchange of the properties in lieu of judicial sale. They had no duties to perform and, in fact, performed none. Their actions resulted in no damage or injury to John Spencer nor, indeed, to anyone else. Their inaction was caused by John and Dorothy's voluntary exchange. John has shown no liability of either or both of the principals, Daun R. Weiers or Michael B. Roche to him and thus has shown no liability for their action or inaction on the party [sic] of surety, St. Paul Fire & Marine Insurance Co. John has simply put his horse in the wrong stable.

Nor do we find any merit in appellant's contention that the surety was negligent in issuing the bond while the case was on appeal. The Court of Appeals has held that an appeal from a decree of a court of equity directing the sale of realty does not stay the proceedings unless an appeal bond is filed or a stay is obtained from the lower court. Cook v. Boehl, 188 Md. 581, 592, 53 A.2d 555 (1947). See also Pulley v. State, 287 Md. 406, 412 A.2d 1244 (1980). Thus, in

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4 Appellant has misstated the issue as "Whether the trial court abused its discretion in dismissing the Motion to Proceed Against Surety."

a case such as this one, where an appeal bond was not filed, and a stay was not obtained from the lower court, the surety was not only permitted to issue the bond, but was required to do so.

JUDGMENT AFFIRMED;

COST TO BE PAID
BY APPELLANT.

MANDATE

COURT OF SPECIAL APPEALS

No. 1202, September Term, 1987

John H. Spencer
v.
St. Paul Fire and Marine
Insurance Company

JUDGMENT: March 24, 1988: Per Curiam Filed. Judgment affirmed; costs to be paid by appellant.

April 13, 1988: Motion for Reconsideration filed by counsel for the appellant.
April 26, 1988: Motion for Reconsideration denied.
April 27, 1988: Mandate issued.

STATEMENT OF COSTS:

In Circuit Court: for GARRETT COUNTY
8477

Record	40.00
Stenographer Costs	605.00
Total	645.00*

In Court of Special Appeals:

Filing Record on Appeal	50.00
Printing Brief for Appellant	96.00
Reply Brief	19.20
Portion of Record Extract--Appellant	484.80
Total	650.00*
Printing Brief for Appellee	67.20
Portion of Record Extract--Appellee	110.40
Total	177.60*

STATE OF MARYLAND, Sct:

I do hereby certify that the foregoing is turly taken from the records and proceedings of the said Court of Special Appeals. In testimony whereof, I have hereunto set my hand as Clerk and affixed the seal of the Court of Special Appeals, this twenty-seventh day of April A.D. 1988.

/S/ Howard E. Friedman
Clerk of the Court of Special Appeals

COSTS SHOWN ON THIS MANDATE ARE TO BE SETTLED BETWEEN COUNSEL AND NOT THROUGH THIS OFFICE.

APPENDIX "B"

JOHN H. SPENCER

v.

ST. PAUL FIRE AND MARINE INSURANCE COMPANY

IN THE

COURT OF APPEALS

OF MARYLAND

Petition Docket No. 137

September Term, 1988

(No. 1202, September Term, 1987, Court of Special Appeals)

ORDER

Upon consideration of the petition for a writ of certiorare to the Court of Special Appeals and the answer filed thereto, in the above entitled case, it is

ORDERED, by the Court of Appeals of Maryland, that the petition be, and it is hereby, denied as there has been no showing that review by certiorari is desirable and in the public interest.

/s/ Robert C. Murphy

Chief Judge

Date: June 27, 1988

FEDERAL RULE OF CIVIL PROCEDURE

Rule 65.1. Security: Proceedings Against Sureties.

Whenever these rules, including the Supplemental Rules for Certain Admiralty and Maritime Claims, require or permit the giving of security by a party, and security is given in the form of a bond a stipulation or other undertaking with one or more sureties, each surety submits to the jurisdiction of the court and irrevocably appoints the clerk of the court as the surety's agent upon whom any papers affecting the surety's liability on the bond or undertaking may be served. The surety's liability may be enforced on motion without the necessity of an independent action. The motion and such notice of the motion as the court prescribes may be served on the clerk of the court prescribes may be served on the clerk of the court, who shall forthwith mail copies to the sureties if their addresses are known.

(Added Feb 28, 1966, eff. July 1, 1966, and amended Mar. 2, 1987, eff. Aug 1, 1987.)

MARYLAND RULES

GENERAL PROVISIONS CHAPTER 400 - BOND

Rule 1-401. Applicability

This chapter applies to any bond filed in a civil action.

Rule 1-404. Proceeding Against Surety

Upon the filing of a bond with the clerk any surety on the bond submits to the jurisdiction of the court and irrevocably appoints the clerk as agent to receive service of any papers affecting the surety's

liability on the bond. The liability of the surety may be enforced on motion without the necessity of an independent action. A motion filed pursuant to this Rule may be served on the clerk who shall promptly notify the surety by mailing a copy of the motion to the surety at the address provided on the bond. The court may provide for additional notice to the surety.

(Source: This Rule is derived from FRCP 65.1)